Canada Industrial Relations Board Conseil canadien des relations industrielles

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Reasons for decision

Canadian Union of Postal Workers,

applicant,

and

TNT Express (Canada) Ltd.,

employer.

Board File: 29013-C
Neutral Citation: 2012 CIRB **629**
February 21, 2012

The Canada Industrial Relations Board (Board) was composed of Mr. Graham J. Clarke, Vice-Chairperson, and Messrs. André Lecavalier and Norman Rivard, Members.

Section 16.1 of the *Canada Labour Code (Part I–Industrial Relations)* (*Code*) provides that the Board may decide any matter before it without holding an oral hearing. Having reviewed all of the material on file, the Board is satisfied that the documentation before it is sufficient for it to issue an interim decision without an oral hearing.

Parties' Representatives of Record

Messrs. Peter Denley and Mark Evard, for the Canadian Union of Postal Workers;
Mr. George Vassos, for TNT Express (Canada) Ltd.

These reasons for decision were written by Mr. Graham J. Clarke, Vice-Chairperson.

I–Nature of the Application

[1] On October 14, 2011, the Canadian Union of Postal Workers (CUPW) filed a certification application for a bargaining unit of employees working at TNT Express (Canada) Ltd. (TNT Canada) at a location in Ottawa, Ontario. This decision does not deal with the merits of that application or the determination of the appropriate bargaining unit, including inclusions or exclusions.

[2] Rather, certain procedural issues require resolution.

[3] The first issue concerns two intervention requests from TNT Canada employees. The second issue concerns whether the certification application should be dismissed for an alleged divulging of confidential membership information.

[4] The third and most important issue concerns whether the Board has constitutional jurisdiction over the application.

[5] For the reasons which follow, the Board has decided to deny the two intervention requests. Also, the Board will not reject the certification application for an alleged violation of section 35 of the *Canada Industrial Relations Board Regulations, 2001* (*Regulations*).

[6] Finally, the Board will require the parties to address fully the constitutional issue, beyond the limited question put forward in their pleadings.

II–Parties' Submissions

A–The Board's Constitutional Jurisdiction

[7] The parties have provided detailed pleadings.

[8] TNT Canada is part of the TNT group of companies providing worldwide delivery and mail services. TNT Canada described how it had not provided mail services since 2001 and that in December, 2010 its parent company, TNT NV, initiated a "demerger" of all TNT delivery and mail activities.

[9] The result was two public companies: PostNL (a mail company) and TNT Express NV (an express company). TNT Canada is not a public company.

[10] TNT Canada operates in five locations across Canada: Vancouver, Calgary, Mississauga, Ottawa and Montreal. TNT Canada describes itself as a freight forwarder.

[11] TNT Canada initially submitted that the reasoning in the Supreme Court of Canada's decision in *Consolidated Fastfrate Inc.* v. *Western Canada Council of Teamsters*, 2009 SCC 53 (*Consolidated Fastfrate*) applied to its undertaking. *Consolidated Fastfrate* held that a pure freight forwarder, which used third parties to do its interprovincial transportation work, did not fall within federal jurisdiction.

[12] TNT Canada also distinguished the Board's recent decision in *TurnAround Couriers Inc.*, 2010 CIRB 544 (*TurnAround 544*). That case had found that certain courier services constituted a "postal service", which brought TurnAround's undertaking within federal jurisdiction. Just as these Reasons were about to be issued, the Federal Court of Appeal overturned *TurnAround 544*: *TurnAround Couriers Inc.* v. *Canadian Union of Postal Workers*, 2012 FCA 36.

[13] CUPW's original application advised that it intended to rely solely on the proposition that TNT Canada's operations constituted a "postal service", as that term was interpreted and applied in *TurnAround 544*. Given its reliance on the *TurnAround 544* decision, CUPW did not intend to submit evidence on whether TNT Canada also operated an interprovincial undertaking.

[14] TNT Canada summarized the jurisdiction issue the parties had submitted to the Board in its November 28, 2011 letter at page 2:

> It appears from the CUPW Submissions that TNT Canada and CUPW are agreed that the only constitutional issue before the Board is whether or not TNT Canada is engaged in a "postal service" (and whether TNT Canada's business is inter-provincial in nature is not in issue before the Board).

[15] TNT Canada has given notice of the constitutional issue to the provincial Attorneys General under section 57 of the *Federal Courts Act*, R.S.C., 1985, c. F-7.

B–The Requests to Intervene

[16] On November 17 and 18, 2011, the Board received two requests to intervene from TNT Canada employees. Mr. Coulson asked for intervenor status on the basis that, as an employee who performed no driving duties and who was therefore excluded from the CUPW's proposed unit, he should have a say on the matter.

[17] The second employee, Mr. Olson, felt he was being excluded from the CUPW's unit as an "operations employee" and that he should be allowed to intervene on the issue of whether or not he should be in the unit.

[18] TNT Canada suggested the Board allow the two intervention requests, since Mr. Coulson's and Mr. Olson's positions supported its view that the Board should expand the scope of the bargaining unit for which CUPW applied initially. It argued that excluding a lone employee from a bargaining unit meant that individual would never have access to collective bargaining.

[19] CUPW indicated that it had not previously realized that Mr. Olson, who did some dispatch duties, also drove for TNT Canada. It therefore would not contest his inclusion in the bargaining unit. CUPW maintained its position that Mr. Coulson, who was a part-time material handler, did not fall within the "driver" bargaining unit for which it had sought certification.

[20] CUPW opposed granting intervenor status to the individuals, whether they fell within or outside the proposed unit. Besides the chaos that such interventions would cause for certification applications, which are dealt with on an expedited basis, CUPW also submitted that the concept of "majority rules" makes it impractical to allow any and all employees to intervene in a matter which concerns a trade union and a specific employer.

C–Membership Wishes

[21] Section 35 of the *Regulations* protects the confidentiality of membership evidence that is submitted to the Board:

> 35. The Board shall not disclose to anyone evidence that could reveal membership in a trade union, opposition to the certification of a trade union or the wish of any employee to be represented by or not to be represented by a trade union, unless the disclosure would be in furtherance of the objectives of the *Code*.

[22] TNT Canada alleged that a CUPW submission about an intervenor allowed an inference to be drawn that that individual had not signed a union card. TNT Canada also suggested that CUPW's submission indicated how many individuals in the proposed unit had signed cards.

[23] TNT Canada argued that this constituted a violation of both section 35 of the *Regulations* and the Board's policy on confidentiality. TNT Canada requested that the Board declare CUPW's application "inadmissible".

III–Analysis and Decision

A–Membership Wishes

[24] The Board dismisses TNT Canada's objection based on section 35 of the *Regulations*. The Board will not comment on TNT Canada's assumptions about CUPW's membership evidence. That evidence is confidential for the Board.

[25] Even if an applicant in a certification application inadvertently disclosed membership evidence, the Board is hard pressed to see how any such error would make a certification application "inadmissible." The text of section 35 of the *Regulations* sets out the Board's obligation to keep membership evidence confidential.

[26] The Board dismisses TNT Canada's request to declare CUPW's certification application inadmissible.

B–Intervention Requests

[27] Mr. Coulson and Mr. Olson have not persuaded the Board that there is anything particular about their situation which would warrant granting them intervenor status in this matter.

[28] A certification application requires a trade union to demonstrate it has appropriate support among a majority of the employees in a unit found appropriate for collective bargaining. This can occur based on signed membership cards or via a Board-supervised vote. In most cases, a trade union and the respondent employer are fully able to debate the merits of the union's proposed bargaining unit, including any inclusions and exclusions.

[29] Generally, the Board does not grant individual employees intervenor status on certification applications, as noted in *TD Canada Trust in the City of Greater Sudbury, Ontario*, 2006 CIRB 363, (*TD 363*), affirmed on judicial review by the Federal Court of Appeal (*TD Canada Trust* v. *United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union (United Steel Workers)*, 2007 FCA 285).

[30] The Board noted in *TD 363* that, in exceptional circumstances, such as to remedy possible natural justice issues, it might grant intervenor status to certain individuals:

> [75] It is to be noted that in a certification application, individual employees are normally not given standing to intervene in regards to the bargaining unit definition. The Board has found in *Nav Canada et al.*, [2000 CIRB 88], that whenever bargaining unit scope is at issue, employees do not have standing, whether dealing with section 18, 18.1 or 27. Employees have no "party" status in relation to bargaining unit definition, unless granted such status at the Board's discretion.

[76] In *TD Canada Trust in the City of Greater Sudbury, Ontario* [2005 CIRB LD 1282], the Board recognized the issue presently being raised and granted the Lively Branch employees status in the reconsideration application filed by the employer. It gave the intervenors the opportunity to make further submissions and the union and employer the chance to respond:

> As regards the application for intervenor status, the reconsideration panel finds that the Lively employees, despite their contention to the contrary, had not been granted intervenor status in Board file no. 24751-C. The reconsideration panel, however, also finds that although the original submissions of the Lively employees were, in part, expressions of their wishes about wanting or not wanting to be represented by the union, there was also a significant component which went to the issues in dispute. Whereas, employee wishes are deemed to be confidential and not shared with the parties, representations addressing the substantive issues under consideration are to be transmitted to the parties and an opportunity given to respond to the points raised. However, as this opportunity was not granted to the parties in file 24751-C, the Board finds it appropriate to grant intervenor status to the Lively employees in the reconsideration application filed by the employer. Accordingly, if the Lively employees wish to make further submissions to the Board with respect to the reconsideration application, they must do so on or before July 5, 2005. The employer and union shall have until July 12, 2005, to file their responses.
>
> (pages 2–3)

[77] The Lively Branch employees have been granted intervenor status in the present application and all parties have had the opportunity to make further submissions within the present reconsideration applications. In the reconsideration panel's view, this alleviates any concerns about the initial panel not disclosing relevant information. All parties have now had an opportunity to make submissions which have been considered by the reconsideration panel within the process of the present application.

(emphasis added)

[31] *TD 363* demonstrated the type of exceptional situation where the Board granted intevenor status to individual employees. This was done to alleviate the concerns arising from a failure to disclose a document which contained substantive representations on the underlying application.

[32] Since no special circumstances comparable to those in *TD 363* exist in the present case, the Board will follow its regular practice and not grant intervenor status to Mr. Coulson and Mr. Olson.

C–Constitutional Issue

[33] The parties do not limit the scope of any constitutional issue before the Board. Whether CUPW raised the issue of the proper characterization of TNT Canada's undertaking or not, the Board must still satisfy itself that it has jurisdiction over the application.

[34] The same principle applies when the parties purport to consent to the Board's jurisdiction. If the Board is not certain whether the *Code* applies, the parties will be called upon to provide appropriate facts and legal submissions (see, for example, *Allcap Baggage Services Inc.* (1990), 79 di 181; and 7 CLRBR (2d) 274 (CLRB no. 778), at pages 184–185; and 276–277).

[35] Notwithstanding the Federal Court of Appeal's recent decision which overturned *TurnAround 544*, the Board still requires the parties' submissions on whether TNT Canada is a freight forwarder within the meaning of *Consolidated Fastfrate Inc.* v. *Western Canada Council of Teamsters*, *supra*, and/or whether it is part of an overall federal transportation undertaking that would make it subject to the *Code*.

[36] To use TNT Canada's phraseology from its November 28, 2011 letter, the Board is of the view that "whether TNT Canada's business is inter-provincial in nature" is an issue the Board must determine before proceeding further with this application. The Board will forthwith set a timetable for the parties representations on this issue.

[37] This is a unanimous decision of the Board.

Graham J. Clarke
Vice-Chairperson

Norman Rivard
Member

André Lecavalier
Member